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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 443

HUGHES TOOL COMPANY
and
RAYMOND M. HOLLIDAY,
Petitioners,

against

TRANS WORLD AIRLINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

Review is here sought of a decision by the United States Court of Appeals for the Second Circuit, reported at 332 F. 2d 602 (Appendix B of Petition, p. 7a *et seq.*), on an interlocutory appeal under 28 U. S. C. §1292(b) from an order of the United States District Court for the Southern District of New York, Metzner, D. J. presiding, reported at 32 F.R.D. 604 (Appendix A of Petition, p. 1a *et seq.*). Judge Metzner's order determined that the defendants (petitioners here) had made a deliberate and wilful default in this action, and ordered that a judgment by default be entered in plaintiff's favor following determination of the amount of plaintiff's damages at a hearing in which the defendants would be represented. That hearing has not yet been held. In addition to the amount of damages, certain other matters of relief were reserved.

The scope of the interlocutory appeal to the Court of Appeals was restricted (1) by the nature of the order appealed from, *i.e.*, an order directing the entry of a default judgment; (2) by the opinion of the District Court, which, in making the jurisdictionally necessary statement that the order involved a controlling question of law as to which there was a substantial ground for difference of opinion, identified that controlling question of law as the question raised below in light of *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963); and (3) by the order of the Court of Appeals limiting permission to appeal to "the issues of (1) whether the U. S. District Court for the Southern District of New York had jurisdiction of the action, and (2) whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the antitrust claim of [TWA]", and continuing with the words "in all other respects the application is denied".

The present posture of this litigation is, therefore, that by reason of defendants' deliberate and wilful default for what they described as "business" reasons [R-24900],* all factual allegations of the complaint are admitted, while all factual allegations in the answer and so-called counterclaims of the defendants cannot be relied upon for any purpose.

Questions Presented

Since the interlocutory appeal to the Court of Appeals for the Second Circuit was limited to the questions whether the District Court lacked jurisdiction of the action by reason of primary jurisdiction over these

* "R" refers to pages of the record in the District Court.

matters residing in the Civil Aeronautics Board and whether the issuance of certain orders by the CAB permitting the defendant to take certain actions constitutes a good defense to the antitrust action, the issues on any review by this Court can be no broader. The statement of questions presented in the petition for certiorari fails to give an accurate picture of these limited issues. Respondent believes the questions which petitioner seeks to present should be more precisely stated as follows:

1. Where an air carrier has filed a complaint against a company engaged in a phase of aeronautics which owns 78% of the stock of the air carrier, and where that complaint alleges serious violations of the antitrust laws by the defendant which have resulted in great financial injury to the plaintiff, is the Federal District Court deprived of jurisdiction by the fact that the Civil Aeronautics Board has issued orders approving the acquisition by defendant of its stock interest in plaintiff, without considering or approving the conduct alleged in the complaint to have violated the antitrust laws?

2. Where the Civil Aeronautics Board has issued orders which, pursuant to statute, have the effect of exempting from the antitrust laws an "acquisition of control", and where an antitrust action is brought alleging that conduct other than the "acquisition of control" violates the antitrust laws, must the court in which the antitrust suit is pending refer to the Civil Aeronautics Board the question whether the statutory exemption extends to the conduct alleged in the complaint?*

3. Does the complaint in this suit state a cause of action?

Counter-Statement of the Case

On June 30, 1961 Trans World Airlines, Inc. ("TWA"), an air carrier with over 15,000 public stockholders,

* As is made clear *infra* at pages 16-17 and 23, this question is not properly before the Court in any event.

brought this action against the persons who had controlled and manipulated TWA and all of its affairs until the end of 1960 for their own benefit. It was enabled to take such action because, as a result of unusual circumstances, a new board of directors and management composed of able and disinterested businessmen had assumed control of TWA early in 1961. After investigation by independent counsel, the new board authorized the filing of this action by which TWA seeks redress under the antitrust laws for both past and continuing injuries inflicted on it by its former masters.

The fundamental facts on which the action is based are formally alleged in the complaint [A-1 *et seq.*].* In broad outline they are relatively simple. Moreover, they now stand admitted by virtue of the default by Hughes Tool Company ("Toolco") and Holliday.

TWA is a substantial market for civilian transport aircraft, and since 1955 for jet-powered civilian transport aircraft. The TWA market is also a substantial part of the total United States market (Complaint, par. 8) [A-4]. Indeed, in some parts of the country which are served only or mainly by TWA, TWA is the sole or principal market for such aircraft.

Beginning about five years after TWA's organization in 1934, defendant Toolco, pursuant to an understanding with Howard R. Hughes (a named defendant herein and the principal conspirator, who however could not be found for service in the action), began to buy up common stock of TWA. By 1944, Toolco held about 45% of TWA's common stock. By 1958, Toolco held about 78% (Complaint, par. 11) [A-10]. TWA was thus controlled by Toolco although neither organized nor wholly-owned by Toolco.

* "A" refers to pages of the Appendix to Brief of Defendants-Appellants filed in this case (28405) with the Court of Appeals.

In the period from 1955 on, the commercial air transport industry moved into the age of jet transport. Preparations were made by suppliers of aircraft (Complaint, par. 13) [A-10]; TWA's competitors were required to face and solve huge financing problems and placed orders for jet aircraft (Complaint, pars. 16, 25, 27) [A-12, A-15].

During this critical period, defendants, for reasons of their own, effectively barred the major designers and suppliers of aircraft from direct access to the TWA market and prevented TWA from itself making any arrangements to acquire jet aircraft (Complaint, par. 17) [A-12]. Defendants were themselves interested in the designing and supplying of aircraft (Complaint, pars. 14, 15) [A-11]. They made use of their control over TWA to assume for themselves the role of an exclusive supplier to TWA (Complaint, pars. 17-20) [A-12-13], using their power over TWA's financing to compel TWA to acquire aircraft as Toolco dictated, and their power over TWA's aircraft acquisition to compel TWA to obtain financing as Toolco dictated (Complaint, pars. 23-24) [A-14-15]. They used the leverage so available to them, together with the financial power which they were able to exert in other ways, such as the private investment of Hughes in Atlas, which was the parent of another air carrier, Northeast Airlines ("Northeast"), to establish themselves as a supplier of aircraft to other American air carriers (*e.g.*, Complaint, pars. 18, 22) [A-12, A-14]. Thus, to the best of their ability, defendants foreclosed various other manufacturers and suppliers from competitive opportunities which would have otherwise been available to them, while with respect to TWA they entirely displaced the manufacturers and financial institutions that would otherwise have provided TWA with equipment and financial aid (Complaint, pars. 17-20, 23-26, 28) [A-12-13, A-14-15].

When in 1960 defendants finally agreed to outside financing for TWA on terms which, by that time, were far less favorable than those which TWA could have obtained in earlier years, not only had the cost to TWA risen enormously (Complaint, par. 28) [A-15], but TWA had been deprived of the opportunity for adequate use of jet aircraft over a period of years (Complaint, par. 52(a)) [A-23].

As part of the 1960 arrangements, Toolco's common stock in TWA was placed in a voting trust (Complaint, par. 31) [A-16]. Having thus lost control of TWA, defendants nevertheless continued to assert a prerogative as supplier. Although TWA had determined that Boeing aircraft were more suitable for its purposes than certain Convair aircraft offered by Toolco, defendants made threats against Boeing, TWA and members of TWA's management when TWA elected to buy from Boeing (Complaint, pars. 37-39) [A-18]. Defendants also took action to hinder the success of outside financing by TWA, intending thereby to increase TWA's dependency on defendants as a source of financing (Complaint, pars. 40-46) [A-19-20]. With their co-conspirator, Atlas, defendants made demands on TWA to enter into a merger agreement with Northeast Airlines, the effect of which would have been to make TWA more dependent on defendants as a source of financing (Complaint, pars. 21, 47) [A-13, A-21].

The foregoing is only a brief summary of the allegations concerning the defendants' attempts to foreclose competition in the supply of adequate financing and modern equipment essential to TWA's business survival. The details of such attempts would have been developed in TWA's examinations before trial and at the trial except for Toolco's "business decision" to default. They have already damaged TWA substantially and have adversely affected competition.

To obtain relief against the pattern of conduct outlined in the complaint, TWA invoked four sections of the antitrust laws—Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act—and the common law prohibition against tortious interference with the business relations of others.

Proceedings Below

In the opinion and order from which the appeal to the Second Circuit were taken Judge Metzner summarized the previous proceedings in this case. See 32 F.R.D. at pp. 606-7.

The astonishing record of evasion, deception and contumacy disclosed in that summary need not be repeated here, particularly since the questions properly before this Court on the present petition are narrow and exclusively jurisdictional.* That the narrowness of the issues presently available is solely the result of the petitioners' deliberate choice, however, sufficiently appears from Judge Metzner's concluding paragraph:

> "On the basis of this record TWA made the motion now before the court. It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts

* While the propriety of the entry of a default judgment was not presented by the interlocutory appeal which is the basis for the instant petition, it was before the Court of Appeals on Toolco's related appeal from Judge Metzner's dismissal with prejudice of its so-called counterclaims. The Court of Appeals unanimously upheld Judge Metzner's conclusion that the proper and necessary consequence of Toolco's deliberate defaults was the entry of a default judgment in favor of TWA and the other counterclaim defendants. (332 F.2d at 611-615). This decision is the subject of Toolco's separate petition in No. 501, filed September 14, 1964.

> to postpone the appearance of Hughes had failed. The default was deliberate and willful • • •." (32 F.R.D. at 607).

Defendants' deliberate defaults also included refusals to obey several court orders for the production of documents.

The Decision of the Court of Appeals

Petitioners argued to the Court of Appeals that the Civil Aeronautics Board had exclusive primary jurisdiction of the conduct alleged in the complaint, that that conduct was exempted from antitrust attack by the orders which the Board had previously issued, and that, in any event, the complaint failed to state a cause of action. The court unanimously rejected all of these arguments.

The court first concluded that there was:

> "• • • no warrant for adopting the position that the subject matter of this litigation was entrusted by Congress to the exclusive jurisdiction of the Civil Aeronautics Board." (332 F. 2d at 610).

Noting the "striking dissimilarities between the operative facts in Panagra and those in the instant case" (332 F. 2d at 608), the court found that "the activities here drawn into issue by TWA's complaint fall without the ambit of that small fraction of antitrust problems placed within the Board's exclusive jurisdiction." (332 F. 2d at 609). The court observed that the complaint enumerated "a variety of transactions over which the Board is given no explicit jurisdiction by the Act" and which were "unrelated to any specific function of the CAB" including:

> "• • • an attempt to monopolize a substantial segment of interstate and foreign air commerce, imposition by the defendants on TWA of the condition that the airline not purchase or lease aircraft from any supplier other than Toolco, and the tying of financing of aircraft acquisitions with

> the purchase of such aircraft from Toolco." (332 F. 2d at 608).

The court felt that the existence and exercise of the Board's power to approve acquisitions of control "hardly supports the defendants' claim that Congress placed the regulation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB." (332 F. 2d at 608-09).

The court also found that there was no merit "in defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the ramifications of these transactions." The court concluded that to give the Board's approval "such a carte blanche effect would be to pervert the entire regulatory structure of the Aviation Act." The court summed up its ruling on this aspect of the appeal by saying:

> "There is thus no cause to hold that these individual and narrow Board orders immunized the defendants from the operation of the antitrust laws with respect to activities not specifically ruled upon by the Board." (332 F. 2d at 610).

Finally, the court had no difficulty in holding that the complaint stated a cause of action under the antitrust laws. The court concluded that:

> "The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes. It would be particularly inappropriate to find these allegations insufficient to establish the district court's jurisdiction inasmuch as the defendants denied the plaintiff the right through pretrial discovery to add more detail and substance to the allegations set forth in the complaint." (332 F. 2d at 611).

Reasons Why the Writ Should Not Be Granted

A. The Order of Which Review is Sought is an Interlocutory Order.

This Court has frequently emphasized its reluctance to review by certiorari an interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry.*, 148 U. S. 372, 384 (1893). As the Court pointed out in *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258 (1916):

> "The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application • • •."

The order of which review is here sought contemplated that a hearing would be conducted to determine the amount of damages suffered by plaintiff and that the court would make further determinations with respect to the equitable relief to be granted, prior to entry of any final judgment. That hearing has not yet been held and those determinations have not yet been made. Apart from the discretionary review authorized by the Court of Appeals pursuant to 28 U.S.C. §1292(b), review even in the Court of Appeals would not have been possible. It is submitted that no extraordinary reason exists here which would warrant this Court's reviewing by certiorari this interlocutory order.

If any questions were raised in the present petition which would warrant review by the Supreme Court, those questions could be fully reviewed after entry of final judgment, and on appeal from that judgment. Moreover, they could be more effectively considered against the backdrop of the relief ultimately ordered by the District Court.

B. The Petition Presents no Issues of Such General Importance as Would Warrant Review by the Supreme Court.

This Court has consistently made plain its disinclination to grant a review on certiorari with respect to orders or judgments of concern only to the parties immediately affected, and without broad significance and public interest by virtue on their impact on other cases.

Thus, the Court has pointed out that it does not sit "to satisfy a scholarly interest" in an issue merely because "it may present an intellectually interesting and solid problem." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74 (1955). The special impact necessary for review on certiorari implies "a reach to the problem beyond the academic or the episodic". (*Ibid*).

The issues presented by petitioners lack the kind of general interest and applicability which this Court ordinarily considers a requisite for the granting of a petition for certiorari. Thus, the issue which petitioners seek to present with respect to whether the conduct alleged in the complaint has been exempted from the antitrust laws by orders issued by the Civil Aeronautics Board involves essentially a comparison of the particular conduct alleged in this complaint with the particular orders issued by the Board to determine whether the Board insulated, or could insulate, by those specific orders, that particular conduct. The facts of this case are exceptional and, indeed, unique. While resolution of this question is, of course, of great importance to the parties to this litigation, it is difficult to envision other litigants, similarly situated, who would be affected by any such determination.

The second issue which petitioners seek to present, *i.e.*, whether the court below should have referred to the Civil Aeronautics Board the question whether the specific conduct alleged in the complaint had been exempted by Board order, is similarly special to this particular case. Peti-

tioners cannot be suggesting that it is a requisite of sound judicial administration, whenever any administrative order becomes relevant in a judicial proceeding, to refer the matter to the agency issuing the order, whether or not the meaning and effect of the order are, in the court's opinion, plain on its face. Any such contention would run against, not only practical sense, but also the many cases in which courts have rendered decisions involving administrative determinations without any such reference.

Thus, the issue posed by petitioners is essentially whether the court, before determining that the particular conduct alleged had not been exempted from the antitrust laws by the particular Board orders here relevant, should have solicited the Board's views. Again, this is a question of interest to no one but the parties to this controversy.

The final question which petitioners seek to present is basically whether the complaint in this case states a cause of action under the antitrust laws. The Supreme Court has frequently drawn the guidelines for determining the sufficiency of an antitrust complaint. There is no reason to believe that a determination of the sufficiency of this particular complaint would add importantly to preexisting statements of principle.*

Since the present petition poses no issue of wide public interest or general impact, it should be denied.

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* In any event, unless the claims under the antitrust laws are frivolous or plainly unsubstantial, the District Court's jurisdiction over the common-law aspects of the same cause of action as presented by the Third Claim for Relief was long ago settled by *Hurn* v. *Oursler*, 289 U. S. 238 (1933). The limitations under which this interlocutory appeal was permitted render consideration of technical antitrust questions permissible only if they affect the jurisdiction of the District Court.

C. There is no Conflict with the *Panagra* Decision.

The principal contention in support of the granting of the writ is that the decision below was somehow inconsistent with this Court's recent ruling in *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963), (*"Panagra"*). An accurate analysis of what the Court decided in *Panagra*, however, and a comparison of that ruling with the facts of this case make it perfectly clear that no such conflict exists.

The Court of Appeals, of course, did not disregard the *Panagra* decision. Instead, after a most careful analysis, it reached the conclusion that its ruling was in all respects consistent with, and supported by, this Court's ruling in *Panagra*.

The lack of conflict is immediately evident when we note that the two decisions dealt with wholly different phases of the problem of relations between the courts and the Board. In *Panagra* the Court was concerned with the impact which forward-looking, *i.e.*, injunctive, judicial relief might have in disrupting prospective action by the Board. In that case the only relief sought in the Government's action was injunctive relief. The Court noted that the Board had full authority to deal with these same problems by injunctive relief under Section 411 (49 U.S.C. § 1381) of the Federal Aviation Act (49 U.S.C. § 1301 *et seq.*) (the "Act").* It was this possible conflict between prospective action which the Board might take and prospective relief which the Court might grant that led the Court to conclude that judicial action should give way to the remedies available to the Board.

* The Federal Aviation Act of 1958 superseded the Civil Aeronautics Act of 1938, the provisions of which, for present purposes, were largely identical, and the sections of which were similarly numbered. References herein to the Act are to the Civil Aeronautics Act as to periods of time when that statute was in effect.

In the instant case, *per contra*, central to the relief sought by plaintiff is an award of damages to compensate it for past transgressions by the defendants. The issues which petitioners now seek to raise are, first, whether the Board has, by its past action, exempted defendants from responsibility for treble damages, and second, whether, in determining what generalized antitrust immunity flows from the Board's specific orders, the court should solicit the Board's views. Petitioners' issues relate entirely to the effect to be given to completed Board action; they relate in no way to any possible "collision of two regimes" arising from mutually inconsistent prospective orders.

The principles governing the effect to be given agency orders which create exemptions from the antitrust laws have long been settled, and were in no way altered by the decision in *Panagra*. The governing principle has long been that such exemptive orders are to be narrowly construed. Thus, in *California* v. *Federal Power Commission*, 369 U. S. 482, 485 (1962) this Court said:

> "Immunity from the antitrust laws is not lightly implied. * * * We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall exclusive one."

See also *United States* v. *Borden Co.*, 308 U. S. 188 (1939); *Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439, 456-57 (1945).

Since the decision in *Panagra* this Court has reiterated the same attitude. See *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963); *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350-51 (1963). In the latter case, for example, the Court emphasized that:

> "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in case of plain repugnancy between the antitrust and regulatory provisions."

The *Panagra* decision in no way purported to alter this rule. Indeed, although petitioners seek to ascribe to that decision a broad and pervasive effect, the opinion itself makes it perfectly clear that the ruling derived very largely from the particular facts of that case. Thus, the Court emphasized the antitrust problems expressly entrusted to the Board "encompass only a fraction of the total" (371 U. S. at 305) and that the Board does not "have jurisdiction over every antitrust violation by air carriers" (371 U. S. at 312). The Court ruled only that:

> "* * * the narrow questions presented by this complaint have been entrusted to the Board * * *" (371 U. S. at 313)

and pointed out that the conduct alleged in the complaint in that case consisted of acts which were:

> "* * * precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending or revoking them and in allowing or disallowing affiliations between common carriers and air carriers." (371 U. S. at 305).

Among the important distinctions between the facts in the *Panagra* case and the facts in this case are the following:

> (1) In that case the only relief sought by the Government was injunctive relief, and the Court held that the Board was perfectly capable of granting the relief sought pursuant to Section 411 of the Federal Aviation Act. In this case, central to the relief sought is an award of treble damages, relief which the Board cannot give.
>
> (2) In the *Panagra* case two of the three participants in the alleged unlawful and conspiratorial activity were air carriers clearly subject to the sanctions available to the Board under Section 411 of the Federal Aviation Act. In this case none of

the defendants is an air carrier or other person subject to the sanctions authorized by Section 411.*

(3) In the *Panagra* case the unlawful conduct alleged related to the division of territories and allocation of routes which the Court found to constitute:

> "* * * precise ingredients of the Board's authority * * *." (371 U. S. at 305).

In the instant case the unlawful conduct alleged was not perpetrated by any air carrier and, rather than relating to questions at the heart of the Board's jurisdiction such as allocation of airline routes, it related to matters on the periphery of the air transportation industry such as the supplying of aircraft and financing to air carriers, over which the Civil Aeronautics Board has been given by Congress no regulatory authority whatever. On the contrary, as to aircraft purchases, Section 401(e) of the Act specifically provides that no condition of an air carrier's certificate shall restrict the right of an air carrier to add to or change equipment and facilities. The manufacture and sale of aircraft, indeed, are no more subject to the jurisdiction of the Board than the manufacture and sale of heavy electrical equipment are subject to the jurisdiction of authorities regulating electric utilities.

Even under petitioners' interpretation, the decision in *Panagra* provides no basis for a reversal here. It should be remembered that the order here appealed from was an

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* Indeed, it is doubtful that the Civil Aeronautics Board has any continuing jurisdiction with respect to Toolco at all, insofar as Toolco's past control of TWA is concerned. As is noted above, Toolco is not a person subject to the sanctions available under Section 411. The Court of Appeals said:

> "* * * it is not even clear that the Board any longer possesses any jurisdiction over the activities of Hughes and Toolco, even under § 408 of the Act, inasmuch as the voting trust arrangement adopted in 1960 appears to have ousted Hughes and Toolco from control over the operations of TWA, such control being a prerequisite to the Board's acting under § 408." (332 F. 2d at 609).

order granting a default judgment because of petitioners' failure to comply with several discovery orders. Only if petitioners can show some jurisdictional defect in those orders can they prevail. Moreover, the issues certified to the Court of Appeals were limited to jurisdictional issues. Petitioners, however, concede that the TWA complaint demands damages, "relief not available in Board proceedings." (Petition, p. 16). Citing this Court's decision in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84 (1962), petitioners argue that, where, as here, there is a remedy in the civil antitrust suit not available before the CAB, the appropriate course is for the court to stay its hand pending action by the Board. To argue, however, that the District Court should have granted a stay by no means establishes that it was without the jurisdiction necessary for the entry of a default judgment for failure to comply with a proper discovery order. Since even under petitioners' theory they could not be entitled to more than a stay of the proceedings in the District Court, it is evident that no ground now exists upon which the order of the court below may properly be reversed. In point of fact, and for the reasons set out above, the Board did not have primary jurisdiction of the conduct alleged in this complaint and not even a stay was warranted.

It is evident that this Court's ruling in *Panagra* in no way conflicts with the decision of which review is here sought.

D. The Second Circuit's Decision that the CAB had not Exempted from the Antitrust Laws the Conduct Alleged in the Complaint was Correct and in Accord with the Decisions of this Court.

Petitioners characterize as "of questionable validity" the Second Circuit's decision that the CAB's orders exempted from the antitrust laws only Toolco's acquisition of control of TWA and not the anti-competitive conduct alleged in the complaint. This ruling, however, was clearly compelled by the Federal Aviation Act, the character of the Board's orders, and this Court's own decisions.

The only authority which the Board has to exempt conduct from the antitrust laws is given it by Section 414 of the Act, which provides that:

> "Any person affected by any order made under Sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws,' * * * *insofar as may be necessary* to enable such person to do *anything authorized, approved, or required by such order.*" 72 Stat. 770 (1958). (Emphasis supplied).

It is significant that Congress, in defining the Board's power to exempt, limited that power to action under only three sections of the Act, Sections 408, 409, and 412.

The only Board orders relevant here were orders issued pursuant to Section 408(a)(5), which makes it unlawful without Board approval:

> "* * * for any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever * * * ."

Since the Board's only jurisdiction under this provision is to approve an acquisition of control, it is clear that any exemption from the antitrust laws consequent on such an order is an exemption only of the acquisition of control.

Petitioners' argument that the approval of the acquisition of control licenses and exempts from the antitrust laws everything which the controlling person may do in the exercise of that control, however anti-competitive the result, is directly contrary to this Court's decisions in *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963) and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690 (1962).

In the *Silver* case this Court held that the fact that the New York Stock Exchange's power to adopt rules did not violate the antitrust laws did not render "particular applications of such rules • • • outside the purview of the antitrust laws." (373 U. S. at 357). It surely follows from the *Silver* case that the Board's approval of Toolco's power to control TWA did not license and exempt each possible application which Toolco might make of that power.

In *Continental Ore* an antitrust defendant's reliance on authority given by the Canadian government to allocate ore purchases was held ineffective because:

> "• • • there is nothing to indicate that such [Canadian] law in any way *compelled* discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." (370 U. S. at 707). (Emphasis supplied).

Toolco seeks to buttress its exemption argument by referring to several orders issued by the CAB modifying its orders approving Toolco's acquisition of control. Thus, petitioners quote from the opinion of the Second Circuit language to the effect that the modification orders included "modification orders approving the specific transactions involving the acquisition of jet aircraft which are

the subject of this litigation." Petitioners omit the next sentence of the opinion in which the Court says:

> "In each case, however, the Board's order states merely the specific terms of the transaction and none of the accompanying conditions which allegedly were foisted upon TWA." (332 F. 2d at 610).

These modification orders add nothing to petitioners' argument for at least two reasons. First, since they are merely orders modifying the Board's original orders approving the acquisition of control, the Board, by issuing them, could confer no exemption broader than that derived from Section 408. As has been noted above, the Board's authority under Section 408, taken together with Section 414, is to approve an "acquisition of control" and to exempt from the antitrust laws only that acquisition.

Second, as the Court of Appeals observed, while the Board modified its control orders to allow TWA to purchase or lease from Toolco certain aircraft, the terms, conditions, and agreements which are alleged to be unlawful were never presented to or ruled upon by the Board. Toolco certainly never presented to the Board for approval its conduct in seeking to monopolize the supplying of aircraft, compelling TWA to boycott all suppliers of aircraft except Toolco, tying financing to the sale of aircraft or the other anti-competitive conduct alleged in the complaint.

The petitioners seek further support for their argument in a distortion of what the Second Circuit, in fact, held. Petitioners argue that what the court did was to "strip antitrust immunity from Board-approved transactions, on the assumption that the Board was not aware of the 'backdrop' of such transactions, without a prior referral of such matters to the Board." (Petition, pp. 18-20). What the court, in fact, said was, not that the

Board's exemption of particular conduct would be disregarded because the Board had not looked at relevant facts, but rather that the Board had never approved or exempted the conduct alleged in the complaint—the backdrop of unlawful conspiracy:

> "The Board's approval extended only to the individual transactions involved in these orders, not to the whole range of activities which over a period of years constitute the backdrop against which these transactions were effected. There is thus no cause to hold that these individual and narrow Board orders immunize the defendants from the operation of the antitrust laws with respect to activities not specifically ruled upon by the Board." (332 F. 2d at 610).

Petitioners' entire argument depends, indeed, on a crucial misrepresentation of the scope and effect of the Board's orders. Repeatedly, petitioners describe these orders as "approving all relevant transactions", or in similar terms. (See, *e.g.*, Petition, pp. 2, 3, 7, 9, 17, 18). It is obvious, however, that the Board orders have no relation at all to many of the relevant transactions—for example, to the diversion by Toolco to TWA's principal trans-atlantic competitor (Pan American World Airways, Inc.) of the six trans-atlantic jet aircraft which TWA should otherwise have received (Complaint, par. 18) [A-12], the diversion of Convair 880 jet aircraft (including jet aircraft actually already formally assigned to TWA) to Northeast Airlines, Inc. (Complaint, par. 22) [A-14], the boycott of other suppliers of aircraft (Complaint, par. 9(c)) [A-8], and many other allegations which now stand admitted by Toolco's default.

Moreover, as to those transactions which are in fact expressly referred to in Board orders, none of them are "approved", except those which constituted "acquisitions

of control" through one of the series of arrangements under which Toolco purchased an ever-increasing amount of TWA's stock. It is "acquisitions of control", not financing or sales of aircraft, to which Section 408 is addressed. The Board's consideration of other transactions was limited to the question whether, because of them, its prior order of approval of Toolco's acquisition of control should be modified or vacated. That in each instance it decided to modify its prior orders so as to remove as to that transaction the conditions prohibiting transactions between TWA and Toolco in excess of a specified sum neither amounted to the entry of a new order under Section 408 carrying with it immunity under Section 414, nor in any way involved a statutory approval of the transaction itself. The Board's own language reflects its recognition that no investigation had been made of these transactions which would justify it in voicing any opinion as to the propriety of their terms, let alone "approving" them, since the orders in question consistently contain a provision to the effect (although variously phrased) that they "shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified herein". (See, *e.g.*, Orders Nos. E-2404 (1949) [A-177], E-10300 (1956) [A-185], and E-16195 (December 29, 1960) [A-218]). The Board itself, in other words, never intended that its non-adversary consideration of these transactions should be subject to reinterpretation by Toolco into a legal approval of their terms, let alone into a legal barrier against just prosecution of Toolco under the antitrust laws for the wrongs which it inflicted upon an air carrier under its domination.

The entire Second and Third Claims for Relief, relating as they do solely to activities subsequent to 1960, deal exclusively with matters never before the Board in any sense whatsoever. Even if petitioners' view of the Board's

orders be accepted, it is hard to see how there can be any relationship between the unlawful conduct there charged and the licenses to violate the antitrust laws which Toolco contends that it received as a result of the earlier orders of the Board.

It is evident that the court below correctly concluded that the Board could not exempt, was not asked to exempt, and did not exempt from the antitrust laws the conduct alleged in the complaint.

E. The Second Circuit Properly Declined to Refer to the Board the Question of the Scope of the Antitrust Exemption which Flowed from the Board's Orders.

Petitioners' argument that the court should have referred to the Civil Aeronautics Board the question whether it had granted an exemption which extended to the conduct alleged in the complaint is not properly before this Court. As is noted above, the order of which review is sought is subject to attack only on jurisdictional grounds and the interlocutory appeal was limited to such grounds. A contention that the District Court should have stayed proceedings pending referral to the Board for a determination of the scope of the antitrust exemption does not raise such an issue.

Petitioners' argument that a referral in this case is "the better approach, more consistent with prior decisions" is, in any event, unsupportable. (Petition, p. 19).

The cases cited by petitioners are not in point. This Court's decision in *Far East Conference* v. *United States*, 342 U. S. 570 (1952), involved a situation where the agreement alleged to be unlawful had never been submitted to the Federal Maritime Board and where the agreement, if approved, would be exempted. This Court held that under those circumstances the case should be

dismissed. The decision obviously had nothing to do with what course a court should pursue where the agency has already acted and the question is only whether and to what extent the agency has exempted the conduct which is the subject of the litigation.

The decision in *United States* v. *Railway Express Agency, Inc.*, 89 F. Supp. 981 (D. Del. 1950), is equally irrelevant. In that case the court made it clear that it was not staying the antitrust suit "for want of power or jurisdiction in this court or by reason of primary jurisdiction in the Commission." (89 F. Supp. at 987). Rather, in view of the fact that there was pending before the Commission a proceeding, the result of which might have an important bearing on the antitrust suit, the court stayed the action as an exercise of its own discretion in order to secure the benefit of the proceeding then pending before the Commission.

In fact, the approach which is "more consistent with prior decisions" is precisely the course which the Second Circuit took in this case.

In its previous decision in *River Plate & Brazil Conferences* v. *Pressed Steel Car Co.*, 227 F. 2d 60 (2d Cir. 1955), the Second Circuit held that where the only question to be decided is whether the Board has or has not approved a particular transaction, the court is quite capable of answering that question for itself:

> "When all that remains is for the Court to say what the plain words of the statute mean and whether the Board has acted, the doctrine of primary jurisdiction does not apply * * *. On the facts before us the question of approval is no more difficult than the score of yesterday's baseball game; the Court can read the score as well as the Board." (227 F. 2d at 63).

See *Putnam* v. *Air Transport Association of America*, 112 F. Supp. 885, 886 (S.D.N.Y. 1953).

Petitioners' argument seems to assume that the business of the Board is granting exemptions from the antitrust laws. Thus, petitioners argue that:

> "The Board, therefore, may have intended the exemptions granted to be broad enough * * * to bar the antitrust claims made in TWA's complaint." (Petition, p. 19).

In fact, the business of the Board is approving or disapproving transactions, relations or agreements which fall within its jurisdiction; so far as the Board is concerned, it is an incidental effect of its approval that particular conduct may be exempted from anti-trust prosecution. The Board may not issue an exemption separate and distinct from its approval of activity which requires its approval. Once the Board has issued an order approving some transaction, then the exemption flows from the statute and is limited to whatever is "authorized, approved, or required" by the approval order. The scope of the exemption depends upon the statute, not upon what the Board might intend.

The Second Circuit correctly concluded that no referral of this issue to the Board was appropriate.

F. The Petition Raises no Antitrust Issues Suitable for Review by the Court.

The petition asserts that important and novel antitrust issues are presented in this case. It further asserts that the effect of the opinion of the court below is to make it a violation of the Sherman and Clayton Acts for a parent to determine with whom the subsidiary shall deal. (Petition, pp. 21-22). These assertions are groundless.

All that was decided by the courts below with respect to the antitrust laws was that the allegations of the com-

plaint were sufficient to withstand a motion to dismiss and permit the plaintiff to avail itself of the processes of the court to collect the evidence otherwise beyond its grasp.

Petitioners' demand for a summary ruling that no antitrust violation could possibly be proved under these allegations was flatly contrary to this Court's stricture in *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464 (1962):

> "We believe that summary proceedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." (368 U. S. at 473).

Moreover, the complaint alleges a conspiracy not solely between parent and subsidiary, as the petition implies, but also with the individual defendants, Atlas Corporation and others not named [A-8, A-13]. Unlawful arrangements with non-affiliates, unlawful tying and exclusive arrangements with TWA, unlawful appropriation of TWA as a captive market, and unlawful monopolization of a substantial segment of commerce were all involved, as well as the diversions of aircraft to TWA's competitors and similar matters which have been referred to above. Such arrangements would not have raised "novel" antitrust issues, as the petition alleges, but would have been clearly within this Court's adjudications of conduct unlawful under the antitrust laws. *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.*, 364 U. S. 656 (1961) (boycotts); *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962) (tying arrangements); *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949) (exclusive arrangements); *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947) (appropriation of captive market, monopolization);

International Boxing Club v. *United States*, 358 U. S. 242 (1959) (monopolization).

Even if the antitrust issues presented in this case were novel, at this stage of the proceedings they have not been delineated with sufficient precision to warrant this Court's consideration. See *Poller* v. *Columbia Broadcasting System*, 368 U. S. at 474, and *White Motor Co.* v. *United States*, 372 U. S. 253 (1963). Petitioners have cited no case in which this Court has granted certiorari to review, before trial, a holding that an antitrust complaint is sufficient.

Conclusion

The petition presents no issue appropriate for consideration by this Court and should be denied.

Respectfully submitted,

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